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ABSTRACT

The paper presents a history of the legal mandates (both legislative and judicial) for equal educational opportunity for linguistic and cultural minorities and describes the denial of this right in Massachusetts, as evidenced by overrepresentation of minorities in special education. Aspects of testing protocol, prereferral modification, and bilingual/special education are among factors considered. Guidelines are offered to help local school districts evaluate their progress in providing equal educational opportunity. (CL)

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CHAPTER 766

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EQUAL EDUCATIONAL OPPORTUNITY IN SPECIAL EDUCATION: LEGAL MANDATES AND STRATEGIES FOR PLANNING

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INTRODUCTION

The last three decades have witnessed an unprecedented growth of statutory and judicial mandates to redress inequities in the educational system. The obvious exclusion of non-English speaking students in schools with English only curriculum was recognized by the Supreme Court in *Lau v. Nichols*. The bias which has allowed school systems to equate bilingualism and cultural differences with mental retardation and learning disabilities was ruled to constitute a denial of equal educational opportunity in two California state cases *Diana v. State Board of Education* and *Larry P. v Riles*.

In light of the continued existence of over-and-underrepresentation of linguistic and cultural minorities in special education, it is clear educators have to re-evaluate the criteria which enter into the determination of services for these children. There is a need for an increased awareness of the manner in which linguistic and cultural differences impact on children's learning and for alternatives within regular education which build upon the uniqueness of each cultural and linguistic group. Differences in cultural and linguistic background cannot be the determining factors for who gets placed in special education.

It is hoped that the following brief history of the legal mandates for equal educational opportunity and the rationale for the Division of Special Education's inquiries into prima facie denial of equal educational opportunity will assist school systems in meeting the challenge of providing services to linguistic and cultural minority students in the least restrictive environment.

Paper presented at The Council for Exceptional Children Conference
on The Exceptional Bilingual Child (New Orleans, LA, February, 1981).

LEGAL HISTORY

Massachusetts' Comprehensive Special Education Law, Chapter 766, was one of the first pieces of legislation to call for the integration of the special education student into the regular classroom. With the enactment of Section 504 of the Rehabilitation Act of 1973, as amended in 1974, and the Education for All Handicapped Children Act of 1975, the terms "mainstreaming" and "least restrictive environment" or "least restrictive alternative" have assumed a dominant role in defining the nature of the implementation of special education. Both laws require, as does Chapter 766 that: (1) handicapped persons between the ages of 3 and 22 be provided a free appropriate public education, (2) handicapped students be educated with nonhandicapped students to the extent appropriate, (3) educational agencies identify and locate all unserved handicapped children, (4) evaluation procedures be adopted to insure appropriate educational services, (5) parents have a substantial role in the consent and approval of evaluation and placement, and (6) procedural safeguards be established.

Statutory and judicial mandates have incorporated procedural safeguards and due process as the key method of assuring parental rights and the appropriate diagnosis and educational placement. In practice, however, this has not been sufficient protection for minority children as is evident from the continued succession of such recent court cases, on the United States District Court level, as *Martin Luther King, Jr. Elementary School children et al. v. Ann Arbor School District Board*, F. Supp. 1371 E.D. Michigan 1979 and *Larry P. v. Wilson Riles Superintendent of Public Instruction for the State of California* (1979). These two cases highlight the role of the courts in addressing and improving those aspects of the educational system that effectively deny minorities equal educational opportunity. Under the law, because the removal of an individual from a regular educational environment represents a limitation of that individual's liberty, it is incumbent upon the school system to demonstrate the appropriateness of their recommendations for placement in an environment which does not meet the criteria of least restrictive environment. The essence of the *Martin Luther King, Jr. Elementary School v. Ann Arbor School District Board* case is the decision that the failure to provide support services within regular education prior to referral and placement in special education effectively forecloses numbers of students from any meaningful educational opportunity.

Because it sheds light on the nature of discriminatory practices with regard to Black children, a brief history of the case is warranted. In 1977 three mothers filed a lawsuit on behalf of their children at the 500 student school. The complaint alleged that students with academic difficulties that result from plaintiffs' "economic, social, and cultural backgrounds" have been treated by school officials as though they're handicapped and placed in classes with students having problems caused by physiological and psychological conditions. The complaint further alleged that school officials had not attempted to determine whether unsatisfactory academic performance was the result

of "cultural, social or economic factors" and that where such factors existed, the plaintiffs sought to require defendants "to provide necessary educational materials and resources including eye glasses and hearing aids...newspapers, magazines, television programs and film assignments, trips, in-service teacher training". (Educational Law Bulletin, #11, April 1978 p. 572) Another issue in the case was the role of so-called Black English in the schools. The plaintiffs held that teachers and administrators viewed pupils who used so-called Black English as having learning disabilities, often erroneously assigning them to special education classes. As a result of the landmark ruling, teachers and administrators are attending five training sessions to sensitize them to the nuances of those students who have a Black English dialect background and to help them recognize when learning problems are caused by the dialect rather than educational disabilities. (New York Times, November 21, 1979)

The danger of practices and procedures which result in the inappropriate placement of children has recently been reiterated in the important Larry P. v. Riles decision which enjoins the State of California from utilizing standardized intelligence tests for the identification of black E.M.R.* children or their placement into E.M.R. classes. (Riles, p. 104) In its summary, the decision states:

In violation of Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act of 1975, defendants have utilized standardized intelligence tests that are racially and culturally biased, have a discriminatory impact against black children, and have not been validated for the purpose of essentially permanent placements of black children into educationally dead-end, isolated and stigmatizing classes for the so-called educably mentally retarded. Further these federal laws have been violated by defendants' general use of placement mechanisms that, taken together, have not been validated and result in a large overrepresentation of black children in the special E.M.R. classes.

Such findings as early grade retention, overageness, low reading scores, high drop out rates, and overrepresentation of minorities in Educably Mentally Retarded classes among the minority and limited English speaking population, identified in hearings held by the U.S. Commission of Civil Rights and by various Senate and House sub-committees in the 1960's, indicated that the schools were not providing limited English speaking students and minority students with equal educational opportunity. Specifically, these findings contributed to an awareness that the practice of monolingual English instruction and the use of standardized tests to determine placement of students in special education, where

* E.M.R. — Educably Mentally Retarded

there were non-English, limited English speaking and minority students, was discriminatory.

The array of state and federal laws as well as the court cases which serve as the underpinnings for the legal mandates derive from the equal protection clause of the Fourteenth Amendment and its statutory equivalent, Title VI of the Civil Rights Act of 1964. According to Title VI: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance". The practical application of the Fourteenth Amendment and Title VI is that a public school system discriminates against limited English speaking children when it fails to educate them in a language they can understand and discriminates against minority children when it fails to take into account the effect of different cultural backgrounds on academic performance.

The federal mandates representing entitlement to equal educational opportunity can be broken down into legislative, executive, and judicial areas. On the legislative level there is Title VI of the Civil Rights Act (1964), the Bilingual Education Act or Title VII (1968), superseded by the Bilingual Education Act of 1974, and the Equal Educational Opportunity Act (1974). On the executive level there is the Office of Civil Rights "May 25th Memorandum" (1970), the Lau Remedies (1975) and the HEW memorandum, "Identification of Discrimination in the Assignment of Children to Special Education Programs" (1975). On the judicial level, there are two Supreme Court cases, *Brown v. Board of Education* (1954) and *Lau v. Nichols* (1974). On the district Court level, there is *Larry P. v. Riles* (1979) a California state case. (See Appendix A for a brief description of each mandate.) Similar entitlement on the state level derives from Chapter 622 and Chapter 71A. Regulation 3.04 of Chapter 622 states: "Each student, regardless of race, color, sex, national origin, religion or limited English-speaking ability, shall have equal rights of access to courses of study and other opportunities available through the school system of the city or town in which he or she resides, along with appropriate bilingual instruction and programs or other curriculum offerings of a supportive nature such as appropriate remedial programs". Regulation 35 of Chapter 71A says: "Children enrolled in Transitional Bilingual Education programs shall have full access to special education and other educational services available to other children in local school districts". The entitlement to special education on the federal level derives from 94-142, Section 504 of the Rehabilitation Act of 1973, and on the state level from Chapter 766.

PRIMA FACIE DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

Although Massachusetts' Chapter 766 provides procedural safeguards and due process to ensure placement within the context of the least restrictive alternative, school systems have been cited for prima facie denial of equal educational opportunity. The Division of Special Education's responsibility to investigate into and hold hearings upon prima facie denials of equal educational opportunity by reason of national origin, sex, economic status, race, religion or physical or mental handicap of school aged children requiring special education is defined in section six of Chapter 71B. The critical section which applies to

linguistic minority and cultural minority children states:

Within any school district if in any special education program there is a pattern of assignment throughout the district on the basis of sex, national origin, economic status, race or religion of the students which is substantially disproportionate from the distribution, the department shall notify each school district of its prima facie denial of equal educational opportunities.

The issue of prima facie denial where linguistic and minority children are concerned surfaced in the Spring of 1978 when the Massachusetts Advocacy Center issued its report, Double Jeopardy, in which it identified opportunity to minority and Hispanic students based upon its findings that minority students were overrepresented in the most restrictive in-school prototypes, and that both Hispanic and minority children were underrepresented in day and residential placements. To identify prima facie denial the Division of Special Education has set up two mechanisms: one, the Bureau of Program Development and Evaluation analysis of the local school systems' statistical data; and two, additional criteria in the Program Audit and Compliance Review processes.

The overall yardstick against which the Bureau of Program Development and Evaluation currently measures prima facie denial is the percentage of white children in special education in the district. If it is agreed let's say, that ten percent of white children in a school district are enrolled in special education then the division's position is that it will apply the same percentage plus or minus twenty percent when it looks at minority and Hispanic enrollment in special education. The use of a quantitative approach serves to alert the State to the possible existence of a prima facie denial problem. To arrive at an understanding of the reasons for the over-and-underrepresentation of cultural and linguistic minority students in special education, the Bureau of Program Audit and Assistance has developed a set of criteria that pinpoint the practices in the local school systems that could contribute to prima facie denial of equal educational opportunity.

The Program Audit and Compliance Review criterion, #15, which addresses pre-referral modification reads as follows:

"All efforts are made to modify child's regular education program prior to referral for TEAM Evaluation and these efforts are documented in child's folder."

The following types of questions should be asked. What modifications took place prior to referral? If behavior is an issue, what behavior management techniques has the regular education teacher tried? What communication has taken place with the home prior to and at the point of referral? Is there a lack of understanding of cultural dif-

ferences between the referring teacher and the child? Could irrelevant personal characteristics, for example, sex of the child, have influenced the decision to refer? In assessing the student's academic performance, is equal weight given to the student's adaptive behavior? Furthermore, the issue of disproportionate enrollment warrants a thorough evaluation of the supportive services in regular education to determine the effectiveness of the prereferral modification. It is necessary to look at the availability and use of such services as remedial reading and math, Title I, work study, alternative schools within schools, guidance services, transitional bilingual education, and vocational education.

Another criterion, #21, which addresses the testing protocol, says:

"a. The results of tests are not used exclusively or principally as basis for any conclusion regarding a child; b. Tests used are as free as possible from cultural and linguistic bias; c. Tests are administered and interpreted only by qualified persons."

At the TEAM Evaluation stage it is critical to have a clear understanding of the local school system's testing protocol. Is there an awareness of the decisions that must go into the selection of appropriate use of tests? For example, considering the reasons for referral, is there a need to utilize behavioral observations, interviews, informal techniques, standardized techniques or a combination of the above? Are the tests being used as a diagnostic tool or as the main factor for determining the placement? Does the test assume a universal set of experiences for all children?

The criterion for non-discriminatory assessment assumes added importance not only in light of the Division's responsibility to inquire into discriminatory practices in special education but also based on the "Memorandum for Chief State School Officers and Local School District Superintendents", issued by the Department of Health, Education, and Welfare, August 1975. This memorandum specifically interprets Title VI and the Education for All Handicapped Children Act as it applies to placement criteria for special classes. It outlines practices which, when impacting adversely on children of one or more racial or national origin groups, may violate Title VI:

Failure to adopt and implement procedures to insure that test materials and other assessment devices used to identify, classify and place exceptional children are selected and administered in a manner which is non-discriminatory in its impact on children of any race, color, national origin or sex.

Such testing and evaluation materials and procedures must be equally appropriate for children of all racial and ethnic groups being considered for placement in special

education classes. In that regard procedures and tests must be used which measure and evaluate equally well all significant factors related to the learning process, including but not limited to consideration of sensorimotor, physical, socio-cultural and intellectual development, as well as adaptive behavior. Adaptive behavior is the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of her or his age and cultural group. Accordingly, where present testing and evaluation materials and procedures have an adverse impact on members of a particular race, national origin, or sex, additional or substitute materials and procedures which do not have such an adverse impact must be employed before placing such children in a special education program.

The practices and procedures which cause a school system to address the testing of minority children from the point of view that such procedures should be no different than they are for white children reflect a lack of awareness which can negatively affect the children. The statutory and judicial mandates seek to guarantee equal treatment for all children. However, the law has never stated that equal treatment means identical treatment for different types of persons. In 1974, the Supreme Court in the landmark case *Lau v. Nichols* (see Appendix A) underscored the concept that equal educational opportunity implies a recognition of individual differences: "There is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education". By the same token, the school system's response that it uses no special criteria from those used for white students when testing black or linguistic minority children appears to be egalitarian. However, this attitude is reflective of a basic ethnocentric bias which mistakenly assumes that to acknowledge individual and cultural differences is tantamount to degrading them.

Specifically, where limited English speaking and/or non-English speaking children are involved there are a number of situations which warrant scrutiny through the Program Audit and the Compliance Review processes.

1. Language needs are mistaken for special education needs - a not uncommon occurrence in local school systems that have bilingual populations of less than twenty and so have no Transitional Bilingual Education program by their own choice; or in local school systems that have Transitional Bilingual Education programs but have youngsters whose language background is not that of the established TBE program.
2. A lack of Transitional Bilingual Education programs at the secondary level for students who have been identified as limited English speaking. These students because of the

lack of linguistic support may be referred to special education if they cannot perform ordinary classwork.

3. English as a Second Language Program in Elementary Schools--
In local school systems which offer ESL pull-out instruction, that is, limited English speaking students receive all subject area instruction in English but are also pulled out for special English language skills training, it is not uncommon to see bilingual children experiencing academic retardation which in turn leads to referrals to special education. English as a Second Language instruction consists primarily of formally learning the oral language skills of listening comprehension and speaking. The problem is that it does not emphasize reading and writing. Thus a first grade limited English speaking student can be learning listening comprehension and speaking skills in ESL but also be expected to learn to read and write in English in their regular classroom. This does not follow in sequence the learning of the four language skills, listening comprehension, speaking, reading, and writing.
4. Title I--In local school systems where there are full-time bilingual programs on the elementary level but a lack of sufficient Title I services, the opportunity to maximize English skills may be denied and result in subsequent referral to Special Education.
5. Bilingual Education-Special Education--In some local school systems, bilingual education is considered special education because of the smaller student:teacher ratio, an aide and extra materials. This attitude can result in bilingual children being moved into special education without due process and procedural safeguards, once they have completed the three year TBE program.
6. Under-referral--In some local school systems, bilingual teachers have been told or have chosen not to refer bilingual children because there is no bilingual special education staff. Inadequate support services frequently result in a more restrictive prototype than would have been warranted had the child received such help when first needed. Similarly, the lack of bilingual special education services while the child is enrolled in TBE may intensify the child's learning problem and require placement in the more restrictive prototypes when the child exits from TBE.

These are just some examples of the reasons why the Division put together in Appendix I of the Program Audit and Compliance Review process, Criteria for Cultural/Linguistic Minority Children to determine whether these children are being provided services in the least restrictive environment.

ANALYSIS OF DATA

There are a number of measures which the local school systems can take to evaluate their progress in providing equal educational opportunity for cultural and linguistic minority children in special education. Using the wealth of statistical data that they gather each year for the Individual School Report, the School Symmary Report, the Local Education Agency Application, and Annual Program Plan for Special Education, the school systems can do the following:

1. Conjunctively review Table 5, Part B, "Students Who Cannot Perform Ordinary Classwork in English" p.6, Individual School Report, and Table 5, Part B, "Students Who Cannot Perform Ordinary Classwork in English Chapter 766 Prototype", p.4, School System Summary Report, to identify the limited English speaking population in special education. If there are students enrolled in Table 5, Part B of the School System Summary Report, it is evident that this warrants close scrutiny.
2. Review Table 5, Part A, "Students Whose First Language is Not English", p.6 Individual School System Report. Although these children are enrolled in English-speaking regular education classes, the parents' dominant language may be other than English. The school system has the responsibility to communicate with the home in the primary language of the home. Should a youngster in this category be referred to special education, it is recommended that language dominance and proficiency testing be conducted to assure that a language need is not mistaken for a special need. This is especially true if there is no TBE or ESL program available as part of the regular curriculum.
3. Review the Annual Plan submitted November 1 of each year. On page 9, do the numbers in the Bilingual Proficiency Special Education Personnel column and under other staff reflect presence of bilingual special education students identified in the October 1 count?
4. On page 42 do the services reflect the presence of bilingual special education students identified in the October 1 count? Do the services reflect efforts to insure that minority special education students are receiving an equal educational opportunity?
4. Review federal funding abstracts for 94-142 monies to see how programs reflect criteria of serving the "un-served and under-served" and of efforts to insure equal educational opportunity for minority students.
5. The data provided in Parts A and B will assist the special education administrator in planning for the evaluations for children whose dominant language is not English, in projecting for the bilingual special education services as well as bilingual special education personnel necessary to meet the needs of these students, and in projecting costs for translation services.
6. The data in Table 5 provides the school system with its own monitoring tool for identifying disproportionate enrollment of cultural and linguistic minority students in special education.

APPENDIX A

Legal Mandates

1. Title VI of the Civil Rights Act of 1964 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance".
2. The first Bilingual Education Act also known as Title VII of the Elementary and Secondary Education Act (ESEA) was passed in 1968. The act has since been amended and its funding allocation expanded. However, the first act is important because it provided supplemental funding for school districts interested in establishing programs to meet the special education needs of large numbers of children of limited English speaking ability in the United States. This act was superseded by the Bilingual Education Act of 1974.

In the 1974 version the Federal Government provided a definition of what constitutes a bilingual education program:

Instruction given in, and study of, English and to the extent necessary to allow a child to progress effectively through the educational system, the native language of the children of limited English speaking ability, and such instruction is given with appreciation for the cultural heritage of such children, and, with respect to elementary school instruction, such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system.

The act provided support for bilingual programs, community activities, training programs, fellowships, planning for programs, and technical assistance. As of 1978 the act was funding 518 bilingual programs, 80% of which are Spanish.

3. Provisions for individuals to initiate civil action when they have been denied equal educational opportunity received backing in the Equal Educational Opportunity Act of 1974. The act declares Congressional policy to be, (1) that all children enrolled in public schools are entitled to equal educational opportunity regardless of race, color, sex, or national origin. The act further defines what constitutes a denial of equal educational opportunity. One of the conditions is:

the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.

4. On the executive level, policy was articulated in "The May 25th Memorandum" (1970) by the Office of Civil Rights. The four points of the memorandum are as follows:
 1. Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
 2. School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.
 3. Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.
 4. School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.
5. Brown v. Board of Education. On May 17, 1954 the Supreme Court ruled that state-imposed racial discrimination was unconstitutional under the equal protection clause of the 14th amendment.
6. On the judicial level the landmark case on equal educational opportunity for limited English speaking children is Lau v. Nichols. This case was filed in San Francisco on May 24, 1970 on behalf of 1,200 Chinese-speaking children who were not being provided educational programs in their language. The case reached the Supreme Court which based its decision strictly on its support of the federal government's jurisdiction to uphold Title VI of the 1964 Civil Rights Act:

We do not reach the Equal Protection Clause argument which has been advanced but rely solely on §601 of the Civil Rights Act of 1964... to reverse the Court of Appeals...

The Supreme Court supported the basic premise of bilingual/bicultural education by stating that the instruction of non-English speaking children in a language they did not understand undeniably constituted a violation of equal educational opportunity.

7. Diana v. State of California - landmark case in legal challenge to school systems with disproportionate numbers of Hispanic children in EMR classes. The case was brought in 1973 by the California Rural Legal Assistance agency on behalf of "Diana" a Mexican American girl, living in Salinas. The judgement of the court was that Mexican American and Chinese-speaking children already in classes for the mentally retarded must be retested in their primary language.

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